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ONG THYE PENG

v.

LOO CHOO TENG & ORS

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF CJ (MALAYA)
AUGUSTINE PAUL FCJ
AZMEL MAAMOR FCJ
[CIVIL APPEAL NO: 02-7-2006 (P)]

C

29 OCTOBER 2007

TRUSTS: *Trust property - Sale - Nature and effect of provision in agreement for sale of trust and estate property - Formal sanction of court - Rights and interests of beneficiaries of estate - Relevant date to*

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determine reasonableness of price of property - Probate and Administration Act 1959, s. 60(3), (4)

SUCCESSION: *Administration - Sale of land - Nature and effect of provision in agreement for sale of trust and estate property - Formal*

E

sanction of court - Rights and interests of beneficiaries of estate - Relevant date to determine reasonableness of price of property - Probate and Administration Act 1959, s. 60(3), (4)

CONTRACT: *Sale and purchase of land - Trust property - Nature and effect of provision in agreement for sale of trust and estate property -*

F

Formal sanction of court - Rights and interests of beneficiaries of estate - Relevant date to determine reasonableness of price of property - Probate and Administration Act 1959, s. 60(3), (4)

This appeal raised for consideration the nature and effect of a

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provision in an agreement for the sale of land which requires the "formal sanction" of the court to sell the property. In this instance, it was cl. 8 of a sale and purchase agreement of property dated 8 January 1979 entered into between the trustees of the property and the purchasers ('agreement'), which provided that

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the trustees shall apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Act 1959 ('1959 Act'). The appellant in the present appeal was one of the original executors and trustees of the deceased's will, while the respondents were the trustees and the purchasers of the

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property. Even though four questions of law were formulated for this court's determination, a consideration of questions Nos. 3 and 4 respectively would be sufficient to resolve the dispute in this

case: whether the beneficiaries of an estate of a person who dies testate should, in law, be entitled to the same measure of protection as that afforded to beneficiaries under the provisions of the 1959 Act and judicial pronouncements thereof; and, whether when a sale of estate property is expressly "subject to sanction from the court, in accordance with the 1959 Act", the primary function of the court is to consider the interests of the beneficiaries to the estate of the deceased and, in particular, adhere to the legal principle that whether the price is a reasonable one is not at the time the offer was made but at the time of the hearing of the application of the proposed sale.

Held (allowing the appeal)
Per Augustine Paul FCJ delivering the judgment of the court:

(1) The language employed in s. 60 of the 1959 Act is clear. It is concerned with the manner of disposal of the property of a deceased person by his personal representative. Section 60(3) of the 1959 Act deals with the disposal of the property of a person who dies testate while s. 60(4) of the 1959 Act deals with the property of a person who dies intestate. Under s. 60(4)(a) of the 1959 Act, the immovable property of a person who dies intestate may not be disposed of without the previous permission of the court. Under s. 60(3) of the 1959 Act, the property of a person who dies testate may be disposed of in any manner the executor may think proper subject to the imposition of any restriction by the will of the deceased. In that event the executor may still do so in accordance with an order of the court. What requires deliberation is the difference in law, if any, in the manner of disposal of the property of a person who dies testate and a person who dies intestate. (para 21)

(2) Executors are trustees of the property of the beneficiaries just as administrators are. As they must act in the interest of all beneficiaries, their duty is to ensure that the estate of which they are trustees benefits as much as possible when they deal with trust property. The result is that the obligation of executors and administrators towards the estate of which they are personal representatives must be the same. This is because their primary duty is to protect the rights and interests of the beneficiaries. There can therefore be no difference in the duty

of administrators and executors in the sale of estate property. It follows that even in the case of a sale of property by an executor, the relevant date to determine whether the price for the property is fair is not at the time of the offer but at the time of the hearing of the application for approval of the proposed sale, just as in the case of a sale by an administrator as explained in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors*. (para 24)

(3) A question that may warrant consideration is whether this conclusion is affected by the different language employed in s. 60(3) and (4) of the 1959 Act. While s. 60(4) refers to the obtaining of the "permission" of the court to approve the sale, s. 60(3) refers to a mere "order of the court" for the disposal of any property. It must be observed that under s. 60(3) of the 1959 Act, the order of the court that is required for the disposal of property is one that is given in substitution of a restriction that has been imposed in the will for such disposal. In making the order, the court will undoubtedly consider whether the restriction imposed by the will ought to be substituted with the proposed disposal. This will bring to the forefront a consideration of the interests of the estate in making the order. This in turn places the order of court that is sought under s. 60(4) and (3) of the 1959 Act in the same position. Thus, the different language employed in both the subsections require the application of the same tests. (para 25)

(4) The property was part of the estate of the deceased who died leaving a will. By an order of court dated 25 August 1975, it was ordered that the estate of the deceased be administered under the control of the court. The two significant parts of that order of court were that the estate of the deceased was to be administered according to the directions in his will and that his immovable properties were to be sold with the approbation of the judge. Accordingly, by order of court dated 13 February 1978, approval was granted by court for the sale of the immovable properties of the deceased. In this subsequent order of court, the property was not one in respect of which approval was granted for its sale. It was, therefore, clear that the property could only be sold pursuant to a separate order of court. This was recognised and patently borne out in various parts of the agreement. Hence, the

propriety and legality of cl. 8 of the agreement was discernible with ease. It had been inserted in the agreement to comply with the requirement of the order of court dated 25 August 1975. The restriction imposed on the disposal of property as stated in the will of the deceased therefore remained with the result that it could be disposed of only pursuant to an order of court as provided by s. 60(3) of the 1959 Act. It could not thus be argued that cl. 8 sought to confer jurisdiction on a court without any authority. (paras 27 & 28)

(5) The "formal sanction" contemplated by cl. 8 was the obtaining of the approval or authorisation of the court in accordance with established procedural rules and practices. This was consistent with the order of court dated 25 August 1975 which required the sale of the deceased's immovable properties with the "approbation" of a judge. As the requirement under cl. 8 of the agreement was to obtain the "formal sanction" of the court "... to sell the property ..." the duty of the court went beyond the terms of the agreement. The "formal sanction" of the court was therefore not a matter of mere formality. It contemplated the approval of the court for the sale. Thus, the court was duty bound to authorise the sale under cl. 8 of the agreement in accordance with procedural rules and established practices. As stated in the answer to Question No. 3, the duty of the court is to ensure that the estate benefits as much as possible so as to accord with established principles. It followed that the answer to Question No. 4 was that the relevant date for determining the reasonableness of the price of the property was the date of hearing of the application. The corollary to the answer to Question No. 4 is that it cannot be argued that a vendor cannot depart from the agreed price for the sale. As the reasonableness of the price is at the date of approval of the court, it follows that the earlier agreed price can be disregarded. It is therefore clear that a better offer at the time of approval would prevail thereby facilitating the withdrawal of the earlier offer. Thus, on the facts of this case, it could not be argued that the beneficiaries would not be allowed to withdraw their earlier consent to sell the property in favour of a higher price. It would conflict with the duty of the court to protect the interests of the beneficiaries. The burden was on the applicant to lead evidence on the current value of the

property. In the absence of such evidence, the court would be entitled to assume that the agreed price was the best obtainable. (paras 29 & 30)

(6) It must be added that the duty of the court was not affected by any delay on the part of the trustees in applying for the sanction on the principle enunciated in *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* to the effect that a person cannot take advantage of his own wrong. This was because the purchasers themselves could have made the necessary application thereby rendering the rule inapplicable as demonstrated in cases such *Silimuthu v. Amalu & Anor* and *Yap Yoke Luan (supra)*. The property could, therefore, only be sold at its market value as claimed by the appellant. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini membangkitkan persoalan mengenai sifat dan kesan peruntukan di dalam perjanjian jual beli tanah yang menuntut supaya "sanksi rasmi" mahkamah diperolehi terselebih dahulu sebelum harta boleh dijual. Dalam kes di sini, ia menyangkuti fasal 8 perjanjian jual beli hartanah bertarikh 8 Januari 1979 yang dimasuki di antara pemegang-pemegang amanah bagi harta dan pembeli-pembeli ('perjanjian'), di mana ia memperuntukkan bahawa untuk menjual harta, pemegang-pemegang amanah hendaklah memohon sanksi rasmi dari mahkamah selaras dengan Akta Probet dan Pentadbiran 1959 ('Akta 1959'). Perayu di rayuan ini adalah salah seorang wasi dan pemegang amanah asal wasiat si mati, sementara responden-responden adalah pemegang-pemegang amanah dan pembeli harta berkenaan. Walaupun empat soalan telah dirumuskan untuk keputusan mahkamah ini, pertimbangan kepada soalan-soalan 3 dan 4 masing-masingnya adalah memadai untuk memutuskan pertikaian, iaitu: sama ada di sisi undang-undang benefisiari pusaka seorang yang meninggal dunia tanpa wasiat berhak kepada perlindungan yang sama seperti yang diberikan kepada benefisiari di bawah peruntukan Akta 1959 dan penghakiman-penghakiman yang dibuat di situ; dan sama ada, apabila penjualan harta pusaka jelas "tertakluk kepada sanksi mahkamah selaras dengan Akta 1959", maka tugas utama mahkamah adalah untuk menimbang kepentingan benefisiari-benefisiari kepada pusaka si mati, dan khususnya mematuhi prinsip undang-undang bahawa sama ada harga adalah harga munasabah

bukan ditentukan semasa tawaran dibuat tetapi semasa pendengaran permohonan cadangan untuk menjual hartanah tersebut.

Diputuskan (membenarkan rayuan)
Oleh Augustine Paul HMP menyampaikan penghakiman mahkamah:

(1) Perbahasaan yang digunakan di dalam s. 60 Akta 1959 adalah jelas. Ia berkaitan dengan cara melupuskan harta seorang si mati oleh wakil-wakil peribadinya. Seksyen 60(3) Akta 1959 adalah mengenai pelupusan harta si mati yang meninggalkan wasiat, manakala s. 60(4) Akta 1959 menangani harta orang yang mati tanpa meninggalkan wasiat. Di bawah s. 60(4)(a) Akta 1959, harta-harta tak alih seorang yang meninggal dunia tanpa wasiat tidak boleh dilupuskan tanpa kebenaran terdahulu mahkamah. Di bawah s. 60(3) Akta 1959, harta seorang yang meninggal dunia dan meninggalkan wasiat boleh dilupuskan dengan cara yang difikirkan sesuai oleh wasi tertakluk kepada syarat-syarat yang ditetapkan oleh wasiat si mati. Dalam keadaan itu, wasi masih boleh melakukannya dengan berpandu kepada satu perintah mahkamah. Apa yang perlu dipertimbang adalah perbezaan di sisi undang-undang, jika ada, dalam cara-cara pelupusan harta di antara mereka yang mati dengan wasiat dan tanpa wasiat.

(2) Wasi-wasi, sama seperti pentadbir-pentadbir, adalah pemegang amanah bagi harta benefisiari. Oleh kerana mereka perlu bertindak untuk manfaat semua benefisiari, maka tugas mereka adalah bagi mempastikan bahawa pusaka yang mana mereka merupakan pemegang amanah mendapat sebanyak mungkin faedah bilamana mereka berurusan dengan harta pusaka tersebut. Natijahnya adalah, tanggungjawab wasi-wasi dan pentadbir-pentadbir terhadap pusaka di mana mereka merupakan wakil diri adalah sama. Ini kerana tanggungjawab utama mereka adalah melindungi hak-hak dan kepentingan benefisiari-benefisiari. Oleh itu, tiada perbezaan antara tanggungjawab seorang wasi dan seorang pentadbir dalam penjualan harta pusaka. Ianya mengikut bahawa, walaupun di dalam kes penjualan harta oleh seorang wasi, tarikh yang relevan bagi menentukan sama ada harga harta adalah adil bukanlah pada waktu tawaran dibuat tetapi pada masa pendengaran permohonan untuk kebenaran penjualan yang

dicadangkan, iaitu sama halnya dalam kes penjualan oleh seorang pentadbir seperti yang dijelaskan oleh *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors*.

(3) Satu persoalan yang menuntut pertimbangan adalah sama ada konklusi ini terjejas oleh kelainan bahasa yang digunakan di dalam s. 60(3) dan (4) Akta 1959. Sementara s. 60(4) merujuk kepada pemerolehan "kebenaran" mahkamah untuk meluluskan penjualan, s. 60(3) hanya merujuk kepada satu "perintah mahkamah" untuk pelupusan mana-mana harta. Harus diperhatikan bahawa, di bawah s. 60(3) Akta 1959, perintah mahkamah yang diperlukan bagi pelupusan harta adalah perintah yang diberi sebagai ganti kepada larangan yang dikenakan oleh wasiat berkaitan pelupusan sedemikian. Dalam membuat perintah tersebut, mahkamah tentunya akan menimbang sama ada larangan yang dikenakan oleh wasiat patut diganti dengan pelupusan yang dicadangkan. Ini membawa mahkamah kepada menimbang kepentingan-kepentingan pusaka apabila membuat perintah. Sekaligus, ia meletakkan perintah mahkamah yang dipohon di bawah s. 60(4) dan (3) Akta 1959 dalam kedudukan yang sama. Oleh itu, kelainan bahasa yang digunakan dalam kedua-dua subseksyen menuntut pemakaian ujian yang sama.

(4) Harta adalah sebahagian daripada pusaka si mati yang mati dengan meninggalkan wasiat. Melalui perintah mahkamah bertarikh 25 Ogos 1975, ianya diperintahkan bahawa pusaka si mati hendaklah ditadbir di bawah pengawasan mahkamah. Dua bahagian penting perintah mahkamah tersebut adalah bahawa pusaka si mati akan ditadbir mengikut arahan-arahan wasiatnya dan bahawa harta-harta tak alihnya hendaklah dijual dengan kebenaran hakim. Dengan itu, melalui perintah mahkamah bertarikh 13 Februari 1978, kebenaran telah diberi oleh mahkamah bagi penjualan harta-harta tak alih si mati. Dalam perintah terkemudian mahkamah ini, harta bukanlah harta di mana kebenaran telah diberi bagi penjualannya. Ianya dengan itu jelas bahawa harta hanya boleh dijual di bawah suatu perintah mahkamah yang berasingan. Ini telah diakui dan terserlah dari beberapa bahagian perjanjian. Oleh itu, keteraturan dan kesahan fasal 8 perjanjian dapat dilihat dengan mudahnya. Terdapat peruntukan di dalam perjanjian untuk mematuhi kehendak perintah mahkamah bertarikh 25 Ogos

1975. Larangan yang dikenakan terhadap penjualan harta seperti yang dinyatakan di dalam wasiat si mati, dengan itu, masih bertahan, dan akibatnya harta hanya boleh dilupus di bawah satu perintah mahkamah seperti yang diperuntukkan oleh s. 60(3) Akta 1959. Oleh itu, adalah tidak boleh dihujahkan bahawa fasal 8 berhasrat memberi bidangkuasa kepada mahkamah tanpa sebarang kuasa.

(5) "Sanksi rasmi" yang dihasrat oleh fasal 8 adalah mengenai mendapatkan kebenaran mahkamah berdasarkan amalan dan kaedah-kaedah prosedur yang mantap. Ini adalah konsisten dengan perintah mahkamah bertarikh 25 Ogos 1975 yang mengkehendaki supaya harta-harta tak alih si mati dijual dengan "kebenaran" seorang hakim. Oleh kerana kehendak fasal 8 perjanjian adalah supaya didapatkan "sanksi rasmi" mahkamah "... untuk menjual harta ..." maka tugas mahkamah adalah melangkahi terma-terma perjanjian. "Sanksi rasmi" mahkamah dengan itu bukanlah satu perkara formaliti semata-mata. Ia menjangkakan kelulusan diberi oleh mahkamah bagi penjualan. Oleh itu, mahkamah bertanggungan untuk membenarkan penjualan di bawah fasal 8 perjanjian selaras dengan kaedah-kaedah prosedur dan amalan-amalan mantap. Seperti yang dinyatakan di dalam jawapan kepada Soalan 3, tugas mahkamah adalah bagi menentukan bahawa pusaka mendapat sebanyak mungkin manfaat bersesuaian dengan kehendak prinsip-prinsip mantap. Ianya mengikut bahawa jawapan kepada Soalan 4 adalah bahawa tarikh yang relevan bagi menentukan kemunasabahan nilai harta adalah pada waktu pendengaran permohonan. Natijah kepada jawapan kepada Soalan 4 adalah bahawa ianya tidak boleh dihujahkan bahawa seseorang penjual tidak boleh lari dari harga jualan yang dipersetujui. Oleh kerana kemunasabahan nilai adalah pada tarikh kelulusan mahkamah, ianya mengikut bahawa harga yang dipersetujui terdahulu boleh diketepikan. Ianya dengan itu jelas bahawa satu tawaran harga yang lebih baik pada masa kelulusan akan terpakai, sekaligus membolehkan penarikan balik tawaran terdahulu. Maka itu, berdasarkan fakta kes ini, ianya tidak boleh dihujahkan bahawa benefisiari-benefisiari tidak boleh menarik balik persetujuan terdahulu mereka untuk menjual harta bagi mendapatkan harga yang lebih tinggi. Itu bertentangan dengan tugas mahkamah untuk melindungi kepentingan benefisiari-benefisiari. Beban adalah atas pemohon

untuk mengemukakan keterangan berhubung nilai semasa harta. Dalam ketiadaan keterangan sedemikian, mahkamah berhak untuk mengandaikan bahawa harga yang dipersetujui adalah harga terbaik yang dapat diperolehi.

(6) Harus ditambah bahawa tugas mahkamah tidak terjejas oleh sebarang kelengahan di pihak pemegang-pemegang amanah dalam memohon sanksi berdasarkan prinsip yang diutarakan di dalam *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* yang menyatakan bahawa seseorang tidak boleh mengambil manfaat atas kesalahannya sendiri. Ini kerana pembeli-pembeli sendiri boleh sahaja membuat permohonan yang perlu sekaligus menjadikan kaedah tidak terpakai seperti yang terserlah dari kes-kes *Silimuthu v. Amalu & Anor* dan *Yap Yoke Luan (supra)*. Oleh itu, harta boleh dijual pada harga pasarannya seperti yang dituntut oleh perayu.

Case(s) referred to:

Bank Negara Indonesia v. Philip Hoalim [1973] 2 MLJ 3 ***(refd)***

Che Ah and Che Yang Kelsom v. Che Ahmad [1941] 10 MLJ (FMSR) 126 ***(refd)***

Cheok Swee Lee & Ors v. Loo Choo Teng & Ors [1997] 4 CLJ 587 HC ***(refd)***

Cheok Swee Lee & 5 Ors v. Loo Choo Teng & Ors [1996] 3 CLJ 433 HC ***(refd)***

Hjh Aminah Bakri v. Manisah Hj Bakri & Ors [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950 HC ***(refd)***

In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased [1982] 2 MLJ 44 ***(refd)***

In re Thomas, Bartley v. Thomas [1911] 2 Ch 389 ***(refd)***

Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and Another Appeal [2000] 2 CLJ 389 CA ***(refd)***

New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France [1919] AC 1 ***(refd)***

Re Hooker's Settlement, Heron v. Public Trustee And Others [1954] 3 All ER 321 ***(refd)***

Silimuthu v. Amalu & Anor [1983] 1 MLJ 190 ***(refd)***

Yap Yoke Luan & Ors v. Ong Wee Tok [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 FC ***(foll)***

Legislation referred to:

Probate and Administration Act 1959, s. 60(3), (4)(a)

Trustee Act 1949, s. 15(2)

Other source(s) referred to:
Mahinder Singh Sidhu, *The Law of Wills Probate Administration and Succession in Malaysia and Singapore,* p 170

For the appellant - Ghazi Ishak (Ong Kheng Leong with him); M/s Ghazi & Lim
For the 1st & 2nd respondents - K Prakash (R Visalrani with him); M/s Shook Lin & Bok
For the 3rd-8th respondents - R Rajasingam (RR Sethu with him); M/s R Rajasingam & Co

[Appeal from Court of Appeal, Putrajaya; Civil Appeal No: P-02-804-2000]

Reported by Suresh Nathan

JUDGMENT

Augustine Paul FCJ:

[1] This appeal raises for consideration the nature and effect of a provision in an agreement for the sale of land which requires the "formal sanction" of the court to sell the property.

[2] The questions of law formulated for our determination are as follows:

1. Whether the principle applicable to the sale of immovable trust property as stated in the Federal Court case of *Yap Yoke Luan & Ors v. Ong Wee Tok* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433, *viz* the court in deciding whether the best possible price had been obtained for the Estate, "the court is concerned that the price is a reasonable one not at the time the offer is made but at the time of the hearing of the application for sanction to the sale", is also applicable in respect of sales of immovable properties belonging to the estate of a deceased by Trustees who are appointed by an Order of Court.

2. Whether, when an Order of Specific Performance in respect of an agreement for sale of trust property is specifically decreed to be "on terms that it be subject to obtaining of sanction", the court is required to formally grant such sanction on the contract price or whether the court, may, in the exercise of its discretion, grant sanction at a price other than the contract price in the interest of the beneficiaries of the estate, or to refuse to grant sanction.

A 3. Whether the beneficiaries of an estate of a person who dies testate should, in law, be entitled to the same measure of protection as that afforded to beneficiaries under the provisions of the Probate and Administration Act 1959 and judicial pronouncements thereof.

B 4. Whether when a sale of estate property is expressly "subject to sanction from the court, in accordance with the Probate and Administration Act 1959", the primary function of the Court is to consider the interests of the beneficiaries to the C estate of the deceased and, in particular adhere to the legal principle that whether the price is a reasonable one is not at the time the offer was made but at the time of the hearing of the application of the proposed sale.

D In order to appreciate the questions posed it is perhaps appropriate to first set out the facts. They have been well dealt with in the judgment of Mohd Ghazali Mohd Yusoff JCA as follows.

[3] The dispute between the parties revolves around a piece of E land previously known as Lot 532, Mukim 12, Daerah Barat Daya, Penang and now known as Lot No 2347, Lot No 2348, Lot No 2349 and Lot No 2350 all in Mukim 12, Daerah Barat Daya, Penang ("the property"). Ong Joo Sun, deceased ("the deceased") was, during his lifetime, the registered proprietor of the F property. He died testate on 20 March 1960 and his Will was proved on 13 December 1963.

[4] On 25 August 1975, the High Court ordered, *inter alia*, that the deceased's estate ("the estate") be administered according to G the terms of his Will and that his immovable properties be sold with the approbation of the judge free from encumbrances, and the proceeds of sale be paid into Court to the credit of his estate. Meanwhile, by Notification No 103 published in the Gazette on 25 April 1974, the State Government of Penang declared its H intention to acquire the property.

[5] By a sale and purchase agreement dated 8 January 1979 ("the agreement"), Loo Choo Teng (the first respondent) and Ong Thai Hong, described therein as the additional trustees of the I estate, who were appointed by an order of the court dated 15 August 1977, sold the property to the following persons, namely:

(i) Cheok Swee Lee (the third respondent);

(ii) Loh Peng Kwan (the fourth respondent);

(iii) Loh Cheok Boon (the fifth respondent);

(iv) Loh Yip Seng (the sixth respondent);

(v) Loh Toa Thau @ Loh Eng Kim (the seventh respondent);

(vi) Loh Gan Teong (the eighth respondent)

("the purchasers"). Ong Gaik Kee (the second respondent) who was appointed as an additional trustee executed the agreement on behalf of the said Ong Thai Hong. The first and second respondents shall hereafter be referred to as "the trustees".

[6] It was provided for in the agreement that the sale was to be subject to an order of court and the property being released by the State Government "from the restriction as published in the Government of Penang Gazette notification No 9 of 1974 and all other Government restrictions whatsoever". It was also provided therein that the purchase price shall be RM1.60 per square foot. The purchasers paid to the trustees a sum of RM150,000 as deposit which was equivalent to approximately 5% of the total purchase price. The purchase was subject to, *inter alia*, the following terms:

(a) the property being released by the Penang State Government;

(b) the trustees deducing a good and marketable title to the property sold;

(c) the property sold was to be free from all encumbrances whatsoever;

(d) the property sold was to be without vacant possession; and

(e) completion of the purchase was to be within six months from the date of the order of court sanctioning the sale by the trustees.

[7] Clause 5 of the agreement provided that if for any reasons whatsoever the State Government refuses to release the property from the restrictions imposed under the Land Acquisition Act 1960 to the estate within two years the agreement shall be null and void. Clause 7 provided that the trustees shall apply to the

A State Government for the release of the property back to the estate for sale to the purchasers. Clause 8 provided that the trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.

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[8] Pursuant to Civil Suit No 8 of 1981 in the High Court at Penang the purchasers instituted proceedings against the trustees and the State Government of Penang for specific performance of the agreement ("the 1981 civil suit"). The action against the State C Government was later discontinued.

[9] The appellant, one of the original executors and trustees of the deceased's Will, on his application, was added as a defendant to the 1981 civil suit. In his statement of defence he had denied the validity of the agreement and had averred that the trustees D could not lawfully enter into the agreement without the prior approval of the court and him. He also alleged the following:

(a) that the trustees had exercised their powers in breach of trust, improperly and without lawful authority;

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(b) that the purchasers were aware that the trustees did not have lawful authority to enter into the agreement;

(c) that even if the agreement was valid, which is denied, the agreement had been terminated as the property was not F released from the notice of acquisition within a period of two years from the date of the agreement.

The High Court ordered that the trustees do specifically perform the agreement. The following orders were also made:

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(i) that the purchasers are to pay the balance sum due (less RM361,114.80) into court on or before 8 October 1997;

(ii) that the trustees are to deliver the documents of title to the property on or before 8 October 1997;

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(iii) that the trustees, within seven days from the date of payment of the balance sum due (less RM361,114.80) are to execute (and or procure the execution) a good and registrable transfer of the property free from all encumbrances in favour of the I purchasers and deliver the memorandum of transfer duly executed to the purchasers' solicitors.

It was also ordered that in the event of the trustees failing to comply with directions (ii) and (iii) above:

(iv) the Registrar of Titles do cancel the present document of titles to the property and issue replacement titles to be collected by the purchasers; and

(v) the learned senior assistant registrar do execute the aforesaid memorandum of transfer in favour of the purchasers.

It was further ordered that the trustees do pay the purchasers the costs of the action. The judgment of the High Court is reported in the Current Law Journal (see *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors* (1997) 4 CLJ 587).

[10] The trustees appealed. The appellant, the fourth defendant in the 1981 civil suit, also appealed. Thus, there were two appeals before the Court of Appeal, *viz*, the trustees were the appellants in Civil Appeal No 556/97 and the appellant herein was the appellant in Civil Appeal No 593/97. Both appeals were dismissed by the Court of Appeal. However, in delivering the judgment of the Court of Appeal, which was reported in the Malayan Law Journal (see *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and another appeal* [2000] 2 CLJ 389), Gopal Sri Ram JCA said (at p. 400):

> Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl. 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

The purchasers did not appeal against the judgment.

[11] As a result of the decision of the Court of Appeal, the trustees, by way of Originating Summons No 24-330-2000, which is the subject-matter of the appeal before us, sought the following reliefs from the High Court:

A (a) that they (ie, the trustees) be given permission to sell the property pursuant to cl. 8 of the agreement and in accordance with the Probate and Administration Act 1959; and

(b) that the permission as aforesaid be given to them (ie, the
B trustees) to sell the property to the purchasers at its market value as at the date of approval of this court or at such other price as the court deems fit and proper.

It was endorsed on the summons that the trustees were seeking
C the reliefs on the ground that the property belongs to the estate and that in connection thereto there was a requirement to obtain the permission of the court for the sale pursuant to cl. 8 of the agreement; and in accordance with the Probate and Administration Act 1959 and the order of the Court of Appeal. The purchasers
D and the appellant were named as defendants.

[12] The High Court granted the first relief sought to the effect that formal sanction be granted to the trustees for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. The second prayer sought to the effect that
E "permission" be granted to the trustees to sell the property to the purchasers at its market value was refused. The appellant appealed against the decision while the trustees did not.

[13] In his submission in the Court of Appeal learned counsel for
F the appellant explained that the appeal is against the decision of the learned High Court Judge in granting sanction for the sale of the property at the price of RM1.60 per square foot. He pointed out that before the learned judge the trustees had exhibited in their affidavit a valuation report which reflected that the market
G value of the property as at 17 July 2000 was RM28 million and that the valuation report was never challenged. He did not however elaborate further as to who bore the burden of making such a challenge and/or the purpose of making such a challenge. Be that as it may, he pointed out that the learned judge admitted
H that the market value was RM28 million and was cognizant that the market value was as such. He added that the Court of Appeal had made an order which gives the learned judge room to exercise his discretion and had also made provisions for sanction to be refused but the learned judge took the view that the application
I for sanction was a mere formality. He then commented on the decision of the learned judge. He argued that when sanction is

applied for, the court should not be a rubber stamp and merely accept the price of RM1.60 per square foot but should instead adopt the market value. He insisted that the learned judge did not exercise his discretion in accordance with decided principles, namely:

(a) he failed to consider that as this was a sale of trust property, the following matters are paramount:

(i) to obtain the best possible price for the estate;

(ii) that the time for determining the price is at the time of the hearing of the application for sanction notwithstanding that the price was reasonable at the time of the agreement;

(b) he failed to protect the rights of the beneficiaries or rights of the estate, namely, he failed to take into account the value of the property at the time sanction was to be granted;

(c) he took the purchasers' rights into account and not that of the beneficiaries; his decision goes against the principle of "best possible price".

In support of his stand learned counsel referred to *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 which he submitted is on all fours with his submission. He also referred to *Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] 10 MLJ (FMSR) 126, and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased* [1982] 2 MLJ 44 which were relied on in that case.

[14] In response, learned counsel for the purchasers contended that the appellant cannot challenge the grant of the sanction. He pointed out that the appellant was only a beneficiary of the estate and was not a party to the agreement and that no other beneficiary was served or appeared when the application for sanction was sought. Further, the appellant was not the applicant in the court below and had not even filed any affidavit. He also pointed out that the application for sanction was a continuation of the 1981 civil suit. When the purchasers filed the 1981 civil suit, the appellant had on his own initiative applied to be joined as a defendant and filed a defence. In that suit, the purchasers claimed no relief against the appellant. The appellant also did not file any counterclaim to set aside the agreement. His stand

throughout was that his consent had not been obtained prior to the execution of the agreement. It was further argued that when the Court of Appeal directed the trustees to apply for formal sanction it did so to comply with cl. 8 of the agreement. The only parties to the agreement were the trustees and the purchasers and no one else. Learned counsel also pointed that the appellant's attempt to amend his statement of defence in the 1981 civil suit 14 years after the close of pleadings, wherein he proposed to, *inter alia*, challenge the authority of one of the trustees to execute the agreement, namely, the second respondent herein and to aver that the purchase price stated in the agreement was below market value and that the sale of the property was against the interest of the estate as a whole, was dismissed by the learned judge (see *Cheok Swee Lee & 5 Ors v. Loo Choo Teng & 3 Ors* [1996] 3 CLJ 433). He argued that the issue of fair value was not within the perimeters of the present appeal. Since the appellant had failed to raise that issue in the 1981 civil suit, he cannot do so now. He also pointed out that the appellant did attempt to adduce evidence of the current value of the property in the 1981 civil suit even though he was not a party to the agreement and that no relief was sought against him but it was disallowed by the judge on the ground that it had not been pleaded and that no relief was sought against him.

[15] In expressing his views on the submissions advanced Mohd Ghazali Yusoff JCA said in his leading majority judgment:

> In my view, the only issue before us is whether the learned Judge had under the circumstances exercised his discretion judiciously when he granted sanction for the sale of the property upon the terms of the agreement, namely at RM1.60 per square foot. I note that according to the *Concise Oxford Dictionary* (9th ed), the word 'sanction', *inter alia*, means 'confirmation' or 'ratify'.
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> In the 1981 civil suit, in dealing with the appellant's averment that he had not given his consent for the sale of the property, the learned Judge said (at page 607 or the reported judgment):
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> > On the 4th defendant's denial that he had not given his consent for the sale, he was not only not supported by the documentary evidence (he was informed, on 12 October 1977, of the proposed sale at RM0.40 p.s.f. see PB3(3-5); he was informed, on 1 March 1979, of the sale – see PB1(12); there is no record of the 4th defendant's objection to the sale in the minutes of the meeting of the trustees

> and beneficiaries – see PB3(12-14); the 2nd defendant's letter to all beneficiaries, and it was not controverted by the 4th defendant has it that every beneficiary agreed to the sale at RM1.60 p.s.f. – see PB3(16-18), a bare denial as such, but was also devoid, so it is perceived, of all *bona fides*.

In the 1981 civil suit, in relation to the position of the trustees in administering the estate at the material time the agreement was entered into, the learned Judge said (at page 609 of the reported judgment):

> It would appear therefore that the 1st defendant and Ong Thai Hong, as of 15 February 1978, were the only trustees of the Estate with administrative powers (the 4th defendant with Boey Khoon Heng effectively sidelined) and that the 2nd defendant appointed a trustee on 8 January 1979 was empowered to sign and execute all documents relating to the administration of the Estate 'in substitution' of the 4th defendant and Boey Khoon Heng. Furthermore, by a Power of Attorney dated 5 October 1978, the said Ong Thai Hong appointed the 2nd defendant his lawful attorney to carry out his duties qua trustee of the Estate. Therefore, on 8 January 1979, both the 1st and 2nd defendants (in the case of the 2nd defendant, as attorney if not trustee) were the only persons empowered to administer the Estate.

What is clear from the above findings made by the learned Judge were the following:

(a) prior to the execution of the agreement, the appellant as beneficiary gave his consent for the sale of the property;

(b) on the date the agreement was executed, the trustees (the 1st and 2nd respondents here) were the only persons empowered to administer the estate.

Before us, the appellant complained that despite his objection, the learned Judge granted the sanction. I cannot see any merit in his complaint. The evidence showed the appellant and also the other beneficiaries were fully aware of the agreement, the price and the 1981 civil suit. The trustees failed to apply for sanction after the property was released from the intended proposed acquisition by the State Authority in 1984. Clause 8 of the agreement made it mandatory for the trustees to apply to Court for 'a formal sanction' to sell the property in accordance with the Probate and Administration Ordinance 1959. There was no term in the

A agreement that the purchasers should apply for such sanction. When the learned Judge granted the sanction, it was confined to the terms of the agreement and as at the date of the agreement. In his grounds of decision in granting the sanction, which was reported in the Malayan Law Journal (*Loo Choo Teng & Anor v. Cheok Swee Lee* [2001] 1 MLJ 216), the learned Judge reiterated what he said in *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors, supra*, at pages 618-619 of the reported judgment, *viz*:

> In the instant case, the 1st and 2nd defendants had an express duty (cl. 8) to apply for that formal consent, the general duty to co-operate and not to prevent the fulfillment of cl. 8 (applying *Mackay v. Dick (supra)* to act *bona fide* (perhaps reasonably) to procure the fulfillment of cl. 8 (applying *Hudson v. Buck (supra)*). The said agreement will be construed so far as possible in such a manner as not to permit the defendants to take advantage of the 1st and 2nd defendants' failure to perform cl. 8 (see *Rede v. Farr* [1817] M & S 121, where a tenant who had failed to pay his rent asserted that by reason of a proviso re-entry his lease was at end. Lord Ellenborough said "… this provision … would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong …". In *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* [1919] AC 1, Lord Atkins said: "But if the stipulation be that the contract shall be void on the happening of an event which one party or other of them can by his own act or omission bring about, then the party, who by his act or omission brings that event about, cannot be permitted either to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case in a roundabout way, but either way putting an end to the contract" such that the defendants cannot rely on their own failure to apply for formal consent as bringing the agreement to an end.

The trustees had the power of sale. The appeal records (at page 203) showed that on 25 August 1975, in Originating Summons No 156 of 1975, the High Court at Penang ordered that the deceased's immoveable property 'be sold with the approbation of the Judge free from encumbrances, (if any), and subject to the encumbrances (if any) of such of them as shall be agreed upon … '. Thus the court had already given the trustees power to sell the property subject to affirmation by a Judge. The appellant and

also the other beneficiaries did not object to the sale at the material time. Further, at the time of the sale in 1979, a valuation report was obtained. It was also not disputed that the acquisition value was only RM0.60 per square foot.

I would agree with the submission of the purchasers' counsel that section 60(4) of the Probate and Administration Act 1959, which provides that 'an administrator may not, without the previous permission of the Court – (a) ... transfer by sale ... any immovable property ...', has no bearing upon the circumstances here. The effect of that provision is that a sale of immovable property by an administrator would not be binding or enforceable unless he has the previous permission of the Court.That provision is certainly not applicable here. The trustees' prime duty is to carry out the terms of the trust. They already had the power to sell prior to entering into the agreement.

I am of the view that the cases referred to by the appellant's counsel can clearly be distinguished on the facts. In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors, supra,* the deceased died intestate. The administrators (the respondents) executed a written agreement for the sale of the land in question with the purchasers (the appellants) who agreed to purchase it free from encumbrances subject to Court approval. The other respondents were the beneficiaries of the estate. It was agreed that in the event that leave of Court was not obtained, the administrators would refund the deposit paid. The administrators failed to apply for leave. The purchasers filed a suit against the administrators and obtained an order from the High Court at Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the land. In compliance with the Court order the administrators filed an application by way of originating summons in the High Court at Seremban citing the beneficiaries as respondents. The purchasers were allowed to intervene. The originating summons was dismissed. The purchasers' appeal to the Federal Court was also dismissed. The learned High Court Judge found that the purchase consideration of $150,000.00 was manifestly low in the light of the valuation of the market value of $244,000.00 for the said land at the material time. It was also found that the administrators had failed to carry out their duty as trustees to obtain the best possible price. The facts showed that most of the beneficiaries had not been consulted nor their consent been obtained neither did the administrators call for a valuation report before entering into the conditional contract.

A The facts and circumstances found in *Che Ah and Che Yang Kelsom v. Che Ahmad, supra,* and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, supra,* referred to by the appellant's counsel, also dealt with conditional contracts of sale of immovable property entered into by administrators of estates which required leave of the Court.

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In the present case on appeal before us, the facts and the surrounding circumstances were clearly different. The trustees had the power to sell and in exercising that power, had taken into regard the rights of the beneficiaries including obtaining their prior C consent. The evidence showed that every beneficiary agreed to the sale of RM1.60 per square foot. The agreement was a valid agreement and was binding on the trustees and purchasers. The only thing left to be done by the trustees was to apply to Court for a formal sanction to sell the property. The learned Judge had meticulously considered all the facts and the surrounding D circumstances before arriving at the decision that he did. As observed by Gopal Sri Ram JCA in *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors, supra* (at page 264), 'this appears to be a case where the vendors, having entered into a perfectly valid transaction went about inventing all sorts of excuses to get out of E it'. His Lordship then went on to say as follows (at pages 264 to 265):

> The main obstacle envisaged by the parties to the sale was the State's refusal to release the subject property from compulsory acquisition. That hurdle having been crossed, F all that remains is the mere formality of obtaining the court's sanction for the sale.

Before us, the appellant's counsel argued that 'when sanction is applied for, the Court should not be a rubber stamp and follow RM1.60 per square foot and should follow market value'. The G Court of Appeal had decreed specific performance and stated that 'all that remains is the mere formality of obtaining the court's sanction for the sale'. In his grounds of decision in granting sanction, the learned Judge held the sanction must be determined with reference to the agreed price and that the agreed price H RM1.60 per square foot at the date of the agreement was the best price obtained for the beneficiaries. Looking at his grounds of decision, I do not think that the learned Judge had acted like a 'rubber stamp' when he granted the sanction. In relation to the application itself, he observed (at page 223):

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> Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application 'for permission to sell the said land at the market value of the said land at the date of the approval by this honourable court, or at such other price as this honourable court deems fit and proper.'

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After giving due consideration to the facts and the surrounding circumstances, the learned Judge said (at pages 225 to 226):

> Specific performance was ordered, at RM1.60 psf. This proceedings cannot nullify that result. Sanction or no sanction must be decided, with the agreed price being the price. If the instant plaintiffs had applied for formal sanction in accordance with the agreement, RM1.60 psf would have been the price before the court, and RM1.60 psf, would have been reflective then of the market price. As correctly said by Dato' Sethu for the instant first to fifth and seventh defendants, the trustees of the estates themselves valued the said land at RM1.60 psf. In other words, the instant plaintiffs had obtained the best price for the beneficiaries of the estate (*Buttle & Ors v. Saunders & Anor* [1950] Ch D 193). Not surprisingly, the beneficiaries themselves, who were duly informed of the sale, did not object to the sale (see p 28 of the notes of evidence – *Cheok Swee Lee & Ors v. Loo Choo Teng & Ors*). Mr Abraham said, and Mr Ong agreed, that at the material time the instant sixth defendant agreed to the sale at RM1.60 psf. If an application for formal sanction had been made in accordance with the agreement, there would have been no reason to refuse formal sanction. Formal sanction, as the Court of Appeal said, was "(a) mere formality ... ". Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for "permission to sell at such other price as this honourble court deems fit and proper" (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable.

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A At the end of the day the learned Judge granted formal sanction to the trustees for the sale of the property upon the terms of the agreement, namely, at RM1.60 per square foot. I am of the view that the learned Judge had taken all factors into consideration and I find nothing wrong with his exercise of discretion in granting the sanction. For these reasons, I would dismiss this appeal with costs and order that the deposit be paid to the 3rd to 8th respondents towards the account of taxed costs.

[16] Mohd Noor Ahmad JCA (as he then was) in agreeing with Mohd Ghazali Yusoff JCA added:

C Premised on the aforesaid facts, the learned Judge proceeded to determine whether or not to grant the sanction and at what price. He had meticulously considered those facts, in particular on the market value at the date of the agreement and the acquisition value and had decided as he did. To my mind, as RM1.60 per D square foot was reflective of the then market price it is manifestly evident that the trustees had obtained the best price for the beneficiaries of the estate. Therefore, it is not apt to say that the learned Judge had acted like a 'rubber stamp' when he granted the sanction.

E I decline to follow the cases of *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1984] 1 MLJ 23, *Che Ah and Che Yang Kelsom v. Che Mat* [1941] 10 MLJ (FMSR) 126, and *In Re the Estate of Tunku Mohmed Jewa ibni Almarhum Sultan Abdul Hamid, deceased* [1982] 2 MLJ 44. I need not repeat the facts of those cases as they F had been elaborated in the judgment of my learned brother. Suffice for me just to restate the principle established in the aforesaid cases. The accepted principles adopted by the courts on an application for leave to sell a deceased estate are (i) the duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchaser (ii) in exercising G its discretion the Court will have to look into the facts and surroundings circumstances of the case, that is to say, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price and (iii) the H Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing of the application. Be that as it may, the facts may vary from case to case and therefore, they can be distinguished, as done in the judgment of my learned brother. That being the case, it is unwise to apply the principle established in the aforesaid cases as a I straightjacket to the present case which can be distinguished. To

my mind, the learned Judge in the exercise of his discretion had to a great extent adhered to the principle established in the aforesaid cases. He did scrutinize the facts and surroundings circumstances and by necessary implication, he was satisfied that the trustees had acted with proper prudence to obtain the best price for the beneficiaries of the estate and that the proposed sale at RM1.60 per square foot, which was agreed to by the beneficiaries, was favourable to them. However, what the learned Judge did not do is that he did not consider whether the price was a reasonable one at the time of the hearing of the application, but he based the reasonableness of the price at the date of the agreement. Was the learned Judge wrong in this departure from the principle established in the aforesaid cases? In my view, both on principle and commonsense he was not. On principle, having regard to the facts and surrounding circumstances of the case at hand, if the test of reasonableness of the price was to be based on the market value of the property at the time of the hearing of the application, that would militate against two other principles of law. The first principle is that the Court cannot rewrite the parties' agreement (see *Law and Practice of Compromise* by David Foskett at page 81, Fourth Edition and quoted with approval by the Court of Appeal in *Lee Lim Huat v. Yusuf Khan bin Ghows Khan & Anor* [1997] 3 AMR 2401, 2415). The second principle is that a party shall never take advantage of his own wrong (see *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* [1991] AC 1). On the first principle, the agreement clearly stipulated the sale price at RM1.60 per square foot. In respect of the second principle, it is evidently clear that the trustees did not apply for the sanction for so long by reason of refusal to perform. On commonsense, I decline to express of what is obvious to a reasonable man.

As the learned Judge had exercised his discretion judiciously on the matter, his decision needs no appellate interference. Therefore, I will dismiss the appeal with costs. The deposit is to be paid to the 3rd to 8th respondents towards the account of taxed costs.

[17] In his dissenting judgment Richard Malanjum JCA (as he then was) said:

Now, clause 8 of the sale and purchase agreement gave due recognition to the 'Probate and Administration Ordinance 1959', now an Act ('the 1959 Act'). Hence, clause 8 read with the 1959 Act was a term by itself to be complied with. It is not therefore surprising that this Court in affirming the decree of specific performance said this:

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> ... I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement.

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Indeed in the Judgment of this Court in the first appeal his Lordship Gopal Sri Ram JCA observed that while the learned Judge in the Court below decreed specific performance of the sale and purchase agreement he '... failed to consider sufficiently, or at all, the effect of cl 8 when exercising his discretion ... .

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Thus, the next question to ask is this: in law what is expected of the learned Judge in the Court below when considering an application for sanction as stipulated in clause 8 of the sale and purchase agreement?

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With respect, from the Judgment of the learned Judge in the Court below it would appear that he was too preoccupied with and perhaps misconstrued what were said by this Court in the first appeal. He completely ignored and failed to consider his primary function, namely to exercise his discretion judiciously, when considering the application for sanction made in compliance with clause 8 of the sale and purchase agreement. At no time this

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Court in the first appeal severed the relevant prerequisites of the 1959 Act from clause 8.

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No doubt in this case the deceased died testate. And when the Will was proved the trustees were empowered vide the Court Order to sell the immovable properties of the estate of the deceased. But surely that could not mean complete freedom for the trustees to act in any manner as they wished. If that is the law then beneficiaries to an estate of a person who dies intestate have a better protection in view of the provisions of the 1959 Act and the judicial pronouncement of the law thereto. Thus, in the

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instant case the terms of the Will should be observed. Additionally clause 8 made specific reference to the 1959 Act which the parties to the sale and purchase agreement and the Court below should not simply ignore.

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In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1984] 1 MLJ 23 a clause in the sale agreement of some pieces of land belonging to the estate of the deceased person stipulated that the administrators as the trustees of the estate must apply for leave from the court in order to finalize the sale. They failed to do so. Yet when leave was finally applied for by the purchasers after a

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lapse of seven years from the execution of the sale agreement the High Court and the then Federal Court approached the issue by stating that '(T)he duty of the Court is to protect the rights of

the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale.'

In the instant case clause 8 of the sale and purchase agreement also stipulated that the trustees must apply for sanction from the court in accordance with the 1959 Act. As such it is my view that the primary function of the Court below when exercising its discretion is to consider the interests of the beneficiaries to the estate of the deceased. Of course, there must be an exercise of discretion in the first place. Otherwise the intended purpose of clause 8 would be rendered illusory.

Accordingly the ultimate question to ask is this: in this case did the learned Judge in the Court below exercise his discretion when considering the application and if so, was there a proper exercise according to law?

This Court in its Judgment in the first appeal clearly stated thus: '… Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance.' The foregoing was a clear indication that proper exercise of discretion was expected from the learned Judge. Hence, I do not think it was the intention of this Court in the first appeal to stifle the discretion of the learned Judge merely by the usage in the Judgment of the words 'apply to court for formal sanction'.

Unfortunately the learned Judge in the Court below appeared to have taken that position when he said in his Judgment these words:

> The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would 'make default', for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon "terms" alien to the agreement.

In fact this Court in the first appeal when affirming the decree of specific performance said this:

> I would vary the order of the learned judge by decreeing specific performance **on terms that** the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. (emphasis added).

With respect, I do not think those words of this Court in the first appeal could, as understood by the learned Judge in the Court below to mean 'ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf '. Hence, I have no reason to accept that he did exercise his discretion when granting the sanction as he did. And on this ground alone that I would allow this appeal, namely, the failure of the learned Judge to exercise his discretion.

Even if the learned Judge in the Court below did exercise his discretion as contended, I am of the opinion that he did so not according to law. He took into account irrelevant matters or failed to take into account relevant matters. For instance, he held the view that he had no choice but to obey the decision of this Court in that any sanction given should be reflective of the terms of the sale and purchase agreement particularly on the selling price of the said land. The learned Judge also appeared to hold the view that the sanction to be given was a foregone conclusion. He failed to consider that refusal as indicated by this Court in the first appeal was an option available to him.

And the legal principle pertaining to an exercise of discretion was restated by this Court in the first appeal in this fashion:

> I take it as settled law that the initial function of this court in a case as the present is one of review only. The fact that I may differ with the learned judge in the way discretion was exercised affords no ground to reverse him. If, however, it is demonstrated that the trial judge failed to take into account relevant considerations or took into account irrelevant considerations or misdirected himself in law or that his order is plainly unjust, then and then only is this court entitled to interfere with the exercise of discretion.

From the Judgment of the Court below it is obvious to me and as indicated above that the learned Judge erroneously bound himself of a perceived 'direction' from this Court in the first appeal. He failed to consider that it was his duty 'to protect the rights of the beneficiaries'. And he also failed to appreciate the

legal principle that he should be 'concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale.' With respect I therefore find that the learned Judge failed to take into account relevant matters and misdirected himself on the law when exercising his discretion, if he ever did. This is another reason for my allowing this appeal.

Accordingly, I think this is a suitable case which warrants interference by this Court in the exercise of discretion by the learned Judge in the Court below. I would therefore vary the term of the sanction granted. *In lieu* thereof I would grant the sanction to sell the said land to the 'first to fifth (and seventh) defendants'/ Respondents subject to its current 'market value at the date' hereof. Effectively, it is the second prayer sought for in the Originating Summons. And since in this case there was no challenge from the Respondents to the Valuation Report submitted I am of the view that the price as valued should be accepted as the market value.

I have considered the other points taken up in this appeal by both sides, *inter alia*, that the Appellant was not a party to the sale and purchase agreement, that the beneficiaries were consulted before the sale, and that in the first suit the issue of the value of the said land was also raised but was not pursued subsequently. In view of the reasons upon which I have come to my decision I do not think these issues could in anyway persuade me to alter my conclusion herein. And specifically on the delay in making the application I do not think that should have any prejudicial effect on the interests of beneficiaries to the estate. The application should have been made by the relevant trustees. Thus, if there was any unjustified delay the estate and the beneficiaries should not be made to bear the consequences. In any event in the instant case the fact that there was a dispute on whether the State Government of Penang had released the said land should be taken into account and not for the learned Judge in the Court below to conclude that '(T)he instant plaintiffs must reap what they sow – the whirlwind.'

This appeal is therefore allowed in term aforementioned with costs to the Appellant to be taxed. The deposit paid is to be refunded to the Appellant.

[18] It is now appropriate for us to deal with the questions of law posed for our determination. In our opinion questions number 1, 2 and 4 cover the same ground. However question number 4 has a direct bearing on cl. 8 of the agreement which is the subject

matter of the contention between the parties. Accordingly, it is our view that a consideration of question numbers 3 and 4 would be sufficient to resolve the dispute in this case. We shall now consider both the questions.

Question Number 3

Whether the beneficiaries of an estate of a person who dies testate should, in law, be entitled to the same measure of protection as that afforded to beneficiaries under the provisions of the Probate and Administration Act 1959 and judicial pronouncements thereof.

[19] In his submission before us learned counsel for the appellant contended that on the authority of *Hjh Aminah bte Bakri v. Manisah bte Haji Bakri & Ors* [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950 an executor, being a trustee, owed a duty to obtain the best price for the assets of the estate that is being sold and that the relevant date to determine whether the sale price is fair is at the date of the hearing of the application for the sanction to sell. Learned counsel for the respondent contended that there is a distinction between a sale by an administrator and an executor or trustee. He said that the appellant's case is founded on s. 60(4) of the Probate and Administration Act 1959 ("the 1959 Act") which, however, refers to an "administrator" and not an "executor" or "trustee". He added that an executor has the power, unless restricted by the Will, to sell the property under s. 60(3) of the 1959 Act.

[20] Section 60 of the 1959 Act reads as follows:

(1) In dealing with the property of the deceased his personal representative shall comply with this section.

(2) Unless the court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal representatives the powers of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.

(3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:

Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the court.

(4) An administrator may not, without the previous permission of the court:

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

(5) Nothing in this section shall affect s. 15(2) of the Trustee Act 1949 (Act 208).

(6) The disposal of property by a personal representative in contravention of this section shall be voidable at the instance of any other person interested in the property.

[21] In our opinion the language employed in s. 60 of the 1959 Act is clear. It is concerned with the manner of disposal of the property of a deceased person by his personal representative. Section 60(3) of the 1959 Act deals with the disposal of the property of a person who dies testate while s. 60(4) of the 1959 Act deals with the property of a person who dies intestate. Under s. 60(4)(a) of the 1959 Act the immovable property of a person who dies intestate may not be disposed of without the previous permission of the court. Under s. 60(3) of the 1959 Act the property of a person who dies testate may be disposed of in any manner the executor may think proper subject to the imposition of any restriction by the Will of the deceased. In that event the executor may still do so in accordance with an order of the court. What requires deliberation is the difference in law, if any, in the manner of disposal of the property of a person who dies testate and a person who dies intestate.

[22] Section 60 of the 1959 Act has been the subject of judicial determination. The effect of s. 60(4) of the 1959 Act was considered in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; ([1983] CLJ (Rep) 433) where Syed Agil Barakbah FJ (as he then was) said at p 253 (p. 435):

> In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale. (*Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] MLJ 126, and *Buttle v. Saunders* [1950] 2 All ER 193, 195 and *Tunku Ismail bin Tunku Mohamed Jewa and Anor v. Tunku Baharom bin Tunku Mohamed Jewa & Ors* [1982] 2 MLJ 44). We agree with respect with the learned judge that the purchase consideration of $150,000.00 was manifestly low in the light of the valuation of the market value of $244,000.00 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common-sense rule of calling for a valuation report. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price.

[23] A matter of concern is whether the requirement of obtaining the best possible price as at the date of hearing is also applicable where an order of court is sought for the disposal of property of a person who dies testate. This issue was considered by the Singapore High Court in *Hjh Aminah bte Bakri v. Manisah bte Haji Bakri & Ors* [1989] 1 CLJ 863; ([1989] 2 CLJ (Rep) 950) where Chao Hick Tin JC (as he then was) said at p 868 (p. 955):

I turn next to the second question: whether this court should approve the sale of the property to the third defendant. An executrix is a trustee and her duty is to obtain the best price for the assets of the estate that are being sold. The authorities would appear to establish the principle that in considering an application of this kind, the duty of the court is to see that the estate benefits as much as possible. There is a clear line of authorities on this. The principal case is a decision of the Court of Appeal of the Federation of Malay States in *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ 126. There an administrator agreed to sell certain land at $12,777.50, subject to the approval of the court. Two of the beneficiaries informed the court that their solicitor had received an offer of $14,000 for the land. The trial judge approved the sale as he was of the view that the price at which the land was to be sold was not shown to be inadequate at the time of contract. On appeal the sale was disapproved. Terrell JA said, at p 127:

> In all these cases the duty of the court is to protect the rights of the parties who have an interest in the property to be sold … I cannot accede to the argument put forward by Mr Rix on behalf of the respondent, the administrator, that the court must consider the interest of the proposed purchaser under the conditional contract. A purchaser under these conditions is perfectly well aware that his contract has to be approved by the court before it can be carried into effect and he takes the risk of losing his bargain if a better offer is obtained before the approval of this court is given, or of being held to his bargain if, for any reason, there has been a fall in the value of the land between the date of his offer and the date of the order confirming the contract … The learned judge approved the conditional contract, being satisfied that at the time the offer was made the price was a reasonable one. As I have said above, I do not consider that that is the correct line of approach, the first duty of the court being to protect the interests of the estate.
>
> The learned judge seems also to have thought that the effect of the later offer may have been to induce the original purchaser to increase his offer. If so, I cannot see that that is any objection …
>
> The principles declared in *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ 126 were applied in *Re The Estate of Tunku Mohamed Jewa* [1982] 2 MLJ 44 and *Yap Yoke Luan v. Ong Wee Tok* [1984] 1 MLJ 23. In the latter case the Malaysian Federal Court reaffirmed that the relevant date to

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> determine whether the price for the property is fair is not at the time of the offer but at the time of the hearing of the application for approval of the proposed sale.
>
> Applying the principles in *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ 126 to the instant case, there can be no doubt that the proposed sale to the third defendant cannot be approved. The relevant date to determine whether the sale price is fair is the date of hearing of this application.

[24] The rationale underlying the argument of Chao Hick Tin JC (as he then was) in the above passage is logical. An executor is a trustee of the property of the beneficiaries just as an administrator is. As Mahinder Singh Sidhu says in his book entitled *The Law of Wills Probate Administration and Succession in Malaysia and Singapore* at p 170, they:

> … must act in the interests of all beneficiaries. They must not favour one rather than another and must 'hold the scales evenly' between them and act with detachment and impartiality (*Yusof bin Ahmad Talib & Ors v. Hong Kong Bank Trustee (S)* [1989] 3 MLJ 84).

As they must act in the interest of all beneficiaries their duty is to ensure that the estate of which they are trustees benefits as much as possible when they deal with trust property. The result is that the obligation of executors and administrators towards the estate of which they are personal representatives must be the same. This is because their primary duty is to protect the rights and interests of the beneficiaries. There can therefore be no difference in the duty of administrators and executors in the sale of estate property. It follows that even in the case of a sale of property by an executor the relevant date to determine whether the price for the property is fair is not at the time of the offer but at the time of the hearing of the application for approval of the proposed sale just as in the case of a sale by an administrator as explained in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 referred to earlier.

[25] A question that may warrant consideration is whether this conclusion is affected by the different language employed in s. 60(3) and (4) of the 1959 Act. While s. 60(4) refers to the obtaining of the "permission" of the court to approve the sale s. 60(3) refers to a mere "order of the court" for the disposal of any property. It must be observed that under s. 60(3) of the

1959 Act the order of court that is required for the disposal of property is one that is given in substitution of a restriction that has been imposed in the Will for such disposal. In making the order the court will undoubtedly consider whether the restriction imposed by the Will ought to be substituted with the proposed disposal. This will bring to the forefront a consideration of the interests of the estate in making the order. This in turn places the order of court that is sought under s. 60(4) and (3) of the 1959 Act in the same position. Thus the different language employed in both the subsections require the application of the same tests.

Question Number 4

Whether when a sale of estate property is expressly "subject to sanction from the court, in accordance with the Probate and Administration Act 1959", the primary function of the court is to consider the interests of the beneficiaries to the estate of the deceased and, in particular adhere to the legal principle that whether the price is a reasonable one is not at the time the offer was made but at the time of the hearing of the application of the proposed sale.

[26] The central issue in this appeal hinges on the nature and scope of the "formal sanction" of the court that must be obtained in respect of the disposal of the property as provided in cl. 8 of the agreement. One of the submissions of learned counsel for the respondents was that parties cannot confer such a jurisdiction on a court by agreement when there is no statutory provision to that effect on the authority of *Re Hooker's Settlement, Heron v. Public Trustee And Others* [1954] 3 All ER 321 and *Bank Negara Indonesia v. Philip Hoalim* [1973] 2 MLJ 3. It was therefore contended that as s. 60(4) of the 1959 Act is only applicable to a sale by an administrator cl. 8 of the agreement cannot confer such jurisdiction thereby rendering ineffective the requirement of the formal sanction.

[27] This submission overlooks s. 60(3) of the 1959 Act and the factual matrix of this case. The property was part of the estate of the deceased who died leaving a Will the material parts of which read as follows:

> I, Ong Joo Sun, married man and landed proprietor of No 11 Presgrave Street, Penang do hereby revoke all former Wills and Codicils and declare this to be my last Will and testament.

A

1. I appoint my son Ong Thye Pang and my daughter Ong Gaik Neoh to the Executor of this my Will and Trustee of all my Estate.

2. I direct my Executor to pay all my just debts, funeral and testamentary expenses.

B

3. I give and bequeath the following legacies:

(1) To my Three (3) wifes Yeoh Chai Luan, Low Too Pat and Cheah Lye Ho two (2) shares each person on my landed properties.

C

(2) To my children One (1) share each person on my landed properties: Ong Ewe Kim, Ong Gek Neoh, Ong Chin Sim, Ong Thye Peng, Ong Thai Guan, Ong Gek Sim, Ong Gek Kee, Ong Gaik Bee, Ong Thai Hong, Ong Gek Looi, Ong Thai Yang, Ong Gek Choo. Total 12 shares only.

D

(3) To my adopted daughter Ang Kheng Hoon Dollars One thousand only ($1000/-)

E

(4) To my adopted son Chan Lang Tong Dollars One Thousand only.

(5) To Phei Shin School, Jelutong Dollars Two Hundred only.

F

4. I give and bequeath all my household furniture, including an iron safe at premises No 11, Presgrave Street, and all the rest and residue of my property whatsoever which I may die possessed of to the said Yeoh Chai Luan and I appoint her residuary legatee hereunder.

G

In Witness Whereof I have hereunto set my hand at Penang this 17th day of July 1959.

[28] By an order of court dated 25 August 1975 it was ordered that the estate of the deceased be administered under the control of the court. The material parts of the Order of Court read as

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follows:

Upon the application of the abovenamed Plaintiff made by way of Originating Summons on the 28th day of July, 1975 and adjourned to this day AND UPON READING the Affidavit of

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Yeoh Chai Luan affirmed on the 23rd day of May, 1975 and filed on the 27th day of May, 1975 together with the exhibits therein referred to and the Affidavit of the 1st Defendant affirmed on the

21st day of August, 1975 and filed on the 22nd day of August, 1975 and the Affidavit of the 2nd Defendant affirmed and filed on the 22nd day of August, 1975 and the exhibit therein referred to AND UPON HEARING Counsel for the Plaintiff and the 1st Defendant the 2nd Defendant being absent IT IS ORDERED that the Estate of Ong Joo Sun, Deceased be administered according to the directions of the Will made by the Testator and dated the 17th day of July, 1959 AND IT IS FURTHER ORDERED that an account by way of a list of all the immovable property which the Testator was seized of and entitled to at the date of his death which has come into the hands of the Defendants as Executors and Trustees for and on behalf of the said Estate or unto the hands of any other persons by the order of or for the use of the Defendants or either of them be given to the Plaintiff's Solicitors within two weeks of date hereof and for consequential enquiries and directions thereof if found necessary AND IT IS FURTHER ORDERED that an account by way of a list of all the moveable property that the Testator was seized of or entitled to at the date of his death which has come to the hands of the Defendants as Executors and Trustees for and on behalf of the Estate or unto the hands of any other persons by the Order of or for the use of the Defendants or either of them be given to the Plaintiff's Solicitors within two weeks of date hereof and for consequential enquiries and directions thereof if found necessary AND IT IS FURTHER ORDERED that an account by way of a list showing what part, if any, of the legacies bequeathed under the Testators Will which is/are outstanding or have been disposed be given to the Plaintiff's Solicitors within two weeks hereof and consequential enquires and directions thereof if found necessary AND IT IS FURTHER ORDERED that an account be given to the Plaintiff's Solicitors within three months of date hereof in the proper Chancery form of all the income received and expenditure incurred during the administration of the Estate to-date, showing all receipts and vouchers therefore AND IT IS FURTHER ORDERED that the Testator's immovable property be sold with the approbation of the Judge free from encumbrances, (if any), and subject to the encumbrances (if any) of such of them as shall be agreed upon AND IT IS FURTHER ORDERED that the Applicant's and the Defendants' Solicitors do have the joint conduct of the sale of all the immovable property of the Testator still remaining unsold AND IT IS FURTHER ORDERED that the proceeds of sale of the Testator's immovable property be paid into Court to the credit of these proceedings subject to further Orders AND IT IS FURTHER ORDERED that the moveable property of the Testator now in the hands of the Defendants be deposited with the Defendants Solicitors subject to further Orders

A and that a list of such moveable property be given to the Plaintiff's Solicitors within two weeks of date hereof AND IT IS LASTLY ORDERED that the cost of and incidental to this application be taxed and paid out of the estate with liberty to apply.

Dated at Penang this 25th day of August, 1975.

B

The two significant parts of the above Order of Court are that the estate of the deceased is to be administered according to the directions in his Will and that his immovable property is to be sold with the approbation of the judge. Accordingly by Order of Court C dated 13 February 1978 approval was granted by court for the sale of the immovable properties of the deceased. The materials parts of the Order of Court read as follows:

IT IS ORDERED AND DIRECTED that in pursuance of the Order of Court dated 25th day of August, 1975 this Honourable D Court do confirm and approve the respective sales of the immovable properties belonging to the Testator i.e.

a) 3/4 undivided share and interest in Lot 225 Mk 11 S.W.D. Penang for $11,655.00 to Madam Ong Ewe Kim;

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b) Lot 489 Mk 11 S.W.D. Penang for $100,000.00 to Tong Hwa Development Sdn Bhd;

c) Lots 742, 293, 457 and 488 Mk 11 S.W.D. Penang for $340,000.00 to Mr Lok Thor Kim;

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d) Lots 298 and 490 Mk 11 S.W.D. Penang for $93,500.00 to Mr Ong Thai Guan;

e) 3/4 undivided share and interest in Lot 299 Mk 11 S.W.D. Penang for $270,000.00 to Mr Ong Thai Guan;

G

f) Lot 1137 Mk 9 S.W.D. Penang for $10,000.00 to Mr Ong Thai Guan

g) Lots 269, 475, 507, 510 and 511 Mk 11 S.W.D. Penang for $276,000.00 to Mr M.K. Teoh;

H

h) Lot 666 T.S. 11-W, N.E.D. Penang for $16,000.00 to Mr Loh Choon Teong and

i) Lot 275 Mk 7 S.W.D. Penang for $315,000.00 to Pin Lim Enterprise Sdn Bhd

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AND IT IS FURTHER ORDERED that Ong Thai Hong do immediately hand over to the Plaintiff's Solicitors all monies belonging to the Estate received by him for and on behalf of the Estate AND IT IS FURTHER ORDERED that Loo Choo Teng and Ong Thai Hong be empowered to sign and execute all documents relating to the sales thereof and give valid discharges therefore in substitution of the Defendants herein the said Ong Thye Peng and Boey Khoon Heng whose names are reflected in the Interim Register AND IT IS FURTHER ORDERED that all the respective sales of the Testator's property be:

a) completed within two (2) months' of the date of this Order;

b) be sold without vacant possession and

c) Capital Gains Tax be paid by the Estate and the respective Certificates of Clearance of Payments be delivered to the Purchasers

AND IT IS FURTHER ORDERED that 2% commission of the sale of each of the properties herein be paid as broker's commission out of the proceeds of sale AND IT IS LASTLY ORDERED that the costs of and incidental to this application be taxed and paid out of the Estate with liberty to apply.

Dated at Penang this 13th day of February, 1978.

It must be observed that in the above order of court the property, that is to say, Lot 532, is not one in respect of which approval was granted for its sale. It is therefore clear that the property can only be sold pursuant to a separate order of court. This is recognised and patently borne out in various part of the agreement the material parts of which read as follows:

WHEREAS the late Ong Joo Sun, died on the 20th day of March 1960 leaving a Will dated the 17th day of July 1959 which Will was proved in the High Court at Penang on the 13th day of December, 1963 in Petition No 232 of 1960.

AND WHEREAS by Order of Court dated the 25th day of August 1975 in Originating Summons No 156 of 1975 it was ordered *inter alia* that the Estate of Ong Joo Sun, deceased be administered according to the direction of the Will made by the Testator and that the Testator's immovable properties be sold and the proceeds of sale be paid into Court to the credit of the Deceased's Estate.

...

A AND WHEREAS the Estate of Ong Joo Sun is in the process of being would up under the administration of the Court, the Trustees under the said Order of Court have agreed to sell and the Purchasers have agreed to purchase all that piece of land and hereditaments more particularly described in the Schedule hereto.

B IT IS HEREBY AGREED AS FOLLOWS:-

1. The Trustees will sell and the Purchasers will buy the land and messuages and hereditaments more particularly described in the Schedule hereto (hereinafter referred to as the property) subject to an Order of Court and the property being released by the State Government from the restriction as published in the Government of Penang Gazette notification No 9 of 1974 and all other Government restrictions whatsoever.

C

D ...

3. The purchase shall be subject to:

(a) The property being released by the Penang State Government;

E

(b) The Trustees deducing a good and marketable title to the property sold;

(c) The property sold to be free from all encumbrances whatsoever;

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(d) Without vacant possession;

(e) Completion of the purchase to be within six (6) months from date of Court Order sanctioning the sale by the Trustees.

G

...

8. The Trustees shall also apply to Court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance, 1959.

H The propriety and legality of cl. 8 of the agreement is therefore discernible with ease. It has been inserted in the agreement to comply with the requirement of the order of court dated 25 August 1975 reproduced earlier. The restriction imposed on the disposal of property as stated in the Will of the deceased therefore

I remains with the result that it can be disposed of only pursuant

to an order of court as provided by s. 60(3) of the 1959 Act. It cannot therefore be argued that cl. 8 seeks to confer jurisdiction on a court without any authority.

[29] The next matter for consideration is the nature and effect of the "formal sanction" that must be obtained as specified in cl. 8. *Black's Law Dictionary* 8th edn defines "formal" as:

> Pertaining to or following established procedural rules, customs, and practices.

And "sanction" as:

> To approve, authorise, or support.

Thus the "formal sanction" contemplated by cl. 8 is the obtaining of the approval or authorisation of the court in accordance with established procedural rules and practices. This is consistent with the order of court dated 25 August 1975 which requires the sale of the deceased's immovable properties with the "approbation" of a judge. This expression is defined in *The Concise Oxford Dictionary* 9th edn as:

> approval, consent.

As the requirement under cl. 8 of the agreement is to obtain the "formal sanction" of the court "… to sell the property …" the duty of the court goes beyond the terms of the agreement. The "formal sanction" of the court is therefore not a matter of mere formality. It contemplates the approval of the court for the sale. Thus the court is duty bound to authorise the sale under cl. 8 of the agreement in accordance with procedural rules and established practices. As stated in answer to Question No 3 the duty of the court is to ensure that the estate benefits as much as possible so as to accord with established principles. It follows that the answer to Question No 4 is that the relevant date for determining the reasonableness of the price of the property is the date of hearing of the application.

[30] The corollary to the answer to Question No 4 is that it cannot be argued that a vendor cannot depart from the agreed price for the sale. As the reasonableness of the price is at the date of approval of the court it follows that the earlier agreed price can be disregarded. As Syed Agil Barakbah FJ (as he then was) said in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; ([1983] CLJ (Rep) 433) at p. 253 (p. 435):

> In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers.

It is therefore clear that a better offer at the time of approval will prevail thereby facilitating the withdrawal of the earlier offer. This position is reflected by the judgment in *In re Thomas, Bartley v. Thomas* [1911] 2 Ch 389 where even after an order approving the sale had been made, but not passed and entered, a higher offer was made the court ordered the property to be put up for auction on an undertaking from the person offering the higher price that he would start the bidding at that price. *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433, is a case where some of the beneficiaries withdrew their earlier consent. Thus on the facts of this case it cannot be argued that the beneficiaries will not be allowed to withdraw their earlier consent to sell the property in favour of a higher price. It would conflict with the duty of the court to protect the interests of the beneficiaries. The burden is on the applicant to lead evidence on the current value of the property. In the absence of such evidence the court will be entitled to assume that the agreed price is the best obtainable.

[31] It must be added that the duty of the court is not affected by any delay on the part of the trustees in applying for the sanction on the principle enunciated in *New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France* [1919] AC 1 to the effect that a person cannot take advantage of his own wrong. This is because the purchasers themselves could have made the necessary application thereby rendering the rule inapplicable as demonstrated in cases such as *Silimuthu v. Amalu & Anor* [1983] 1 MLJ 190 and *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; ([1983] CLJ (Rep) 433). In the latter case Syed Agil Barakhah FJ (as he then was) said at p. 254 (p. 436):

> The next important issue relates to the delay by the administrators to apply for leave of the Court during the period as specified in clause 2. There appears to be a delay of about seven years until the date of the proceeding. About two years after the execution of the agreement the appellants filed Civil Suit No 847 of 1975

against the respondents but waited more than five years to obtain a Court Order requiring the administrators to apply for leave to sell the said land. No doubt the administrators had failed to act under clause 2 on the mistaken ground as stated earlier. However there was no reasonable excuse for the appellants to have been inactive for such a long period without seeking relief under O. 80 RHC much earlier. It would seem that they were content to lie low without taking any step whatever in the belief that their occupation of the land and payment of deposit and other expenses, would strengthen their position as purchasers. Little did they realise that according to prevailing current events land values have rocketted sky high since the execution of the agreement. Faced with strong opposition from almost all the beneficiaries right from the beginning and the inaction of the administrators to comply with clause 2 of the agreement, they failed to comprehend that their task in convincing the Court that the purchase consideration of $150,000.00 was favourable to the beneficiaries, was rendered difficult.

We do not agree with the submission that the agreement has already lapsed in view of the proviso in clause 2 which reads:

> ... PROVIDED THAT should the said Order approving the sale and transfer of the said lands be delayed, this Agreement shall still be in force.

We read the order as referring to delay by the Court in approving the sale and transfer and not delay by any of the parties to the agreement. However in the absence of arguments on the legality or otherwise of the proviso, we feel justified in concluding as the learned judge has done, that the appellants are also responsible for the inordinate delay and have themselves to blame for it.

[32] The property can therefore only be sold at its market value as claimed by the appellant. In the upshot we allowed the appeal with costs.